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THE HONORABLE JOHN C. COUGHENOUR

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BEHR PROCESS CORPORATION,

Plaintiff,

v.

BULLIVANT HOUSER BAILEY, P.C.;
JOHNSON CHRISTIE ANDREWS &
SKINNER, P.S.; RICHARD L. MARTENS and
JANE DOE MARTENS and the marital
community thereof; and R. PENNOCK GHEEN
and JANE DOE GHEEN and the marital
community thereof,

Defendants.

NO. C-01-0467C

DECLARATION OF
JOAN C. FOLEY



01-CV-00467-DECL

I, Joan C. Foley, hereby certify and declare as follows:

1. I am a partner at the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, and an attorney for Defendants Bullivant Houser Bailey, P.C. ("BHB") and E. Pennock Gheen in this action.

2. On September 30, 2003, Defendants BHB and Gheen responded to Plaintiff's First Requests for Production to Defendant. Attached as Exhibit 1 and 2 are true and correct copies of Plaintiff's First Requests for Production of Documents and Responses Thereto by

DECLARATION OF JOAN C. FOLEY - 1 of 5
(C-01-0467C)
[108010 v12]

LAW OFFICES
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Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen (without Exhibits).
Request for Production Nos. 4 and 5 and the Responses thereto are as follows:

Request for Production No. 4: Please produce all documents relating to any claims, complaints or client letters from 1996 to present, containing, without limitation, allegations of conflict of interest, improper business, billing or staffing practices, or breaches of legal ethics by your law firm.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 2, 3, and 6, above. Among other things, the breadth of this request would require these Defendants to search every single past and present client file for the past seven (7) years. Without waiving these objections and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Excerpts of annual E&O insurance applications; "claims, complaints, or client letters" concerning the attorneys at Bullivant Houser Bailey, P.C. who represented Behr in *Smith* and *Truax*, apart from those that may be contained in individual client files; and audit letters from or on behalf of the Insurers in *Smith* and *Truax*, will be made available for inspection at a mutually convenient date and location.

Request for Production No. 5: Please produce all documents in any way relating to your business relationship with the insurers, including, but not limited to, any agreements, billing and other guidelines, and any practices or procedures relating to the opening or maintaining of client files or matters that involve insurers.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2 and 3, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Documents responsive to this request will be made available for inspection at a mutually convenient date and location.

3. General Objections Nos. 1, 2, and 3 are as follows:

1. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to each request to the extent that it seeks documents that are equally accessible and available to Plaintiff. The vast majority of requested documents are already in the possession of Plaintiff and/or Plaintiff's counsel. Furthermore, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen have already produced/made available for inspection to Plaintiff the vast majority of requested documents on multiple occasions. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen therefore respond to each such request by stating that they will make such documents available for inspection if they are not already in Plaintiff's possession or cannot be readily obtained by Plaintiff.

2. The sheer size and volume of these requests for production, and many of the specific requests, manifest a clear intent by Plaintiff to intimidate, harass, embarrass and place undue and unjustifiable burdens on Defendants in violation of the Federal Rules of Civil Procedure. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to those requests that are designed to harass, intimidate, embarrass and place undue and unjustifiable burdens on Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen and that are not instead reasonably calculated to lead to the discovery of admissible evidence.

3. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to these discovery requests to the extent that they are overly broad, vague, ambiguous, and not reasonably calculated to lead to the discovery of admissible evidence.

4. On October 14, 2003, at plaintiff's counsel's request, plaintiff's counsel Evan Schwab and Timothy Butler and defendants' counsel Mark Honeywell, Donald Cohen, and I attended an in-person Rule 37 conference concerning Plaintiff's First Requests for Production of Documents and Responses Thereto by Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen. During that conference, Mark Honeywell, Donald Cohen and I informed Messrs. Schwab and Butler that as to BHB's "billing practices and complaints from clients and insurers",¹ BHB will not go through individual client files to obtain responsive documents. Defendants BHB and Gheen would, and have, produced the files in *Smith, et. al.*

¹ The quoted text is from my contemporaneous hand-written notes of the Rule 37 conference.

1 *v. Behr Process Corp.* Grays Harbor County Cause No. 98-2-00635-4, and *Truax, et. al. v.*
2 *Behr Process Corp.*, Grays Harbor County Cause No. 96-2-00737. Messrs. Schwab and
3 Butler informed us that the responsive documents they sought included BHB's internal
4 memorandums regarding insurance engagements. We discussed obtaining such documents
5 from managing partners or practice group coordinators rather than from individual client files.

6 5. We did not agree to search through BHB individual client files assigned by
7 the Insurers (other than *Truax* and *Smith* files) to retrieve documents which may be responsive
8 to Request for Production No. 5. We have been advised by our client, BHB, that from 1996
9 to present, the Insurers, Zurich and AISLIC, have assigned to BHB in excess of 1,100
10 separate files, other than *Truax* and *Smith*. The overwhelming majority of these files are
11 closed, and to the extent they have not been destroyed, are stored off-site in either
12 Washington, Oregon, or California. It would be burdensome in the extreme to retrieve each
13 and every one these files, and review them to determine whether they contain any
14 communications or other documents relative to agreements or other billing and guidelines
15 practices and procedures between BHB and the insurers and then contact each and every
16 client to obtain their consent to release the information requested by Behr. Defendants BHB
17 and Gheen are producing, however, responsive documents from the files of the BHB partners
18 who maintain the billing practices and guideline communications files with the Insurers.

19 6. Attached as Exhibit 3 is a true and correct copy of my letter to Evan Schwab
20 and Timothy Butler dated October 20, 2003 regarding the Rule 37 conference of October 14,
21 2003.

22 //

23 //

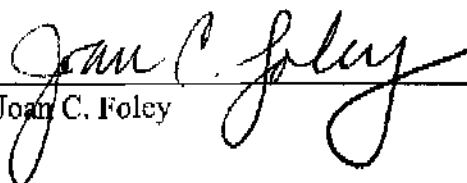
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DECLARATION OF JOAN C. FOLEY - 4 of 5
(C-01-0467C)
[108010 v12]

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2 I certify and declare under penalty of perjury under the laws of the State of
3 Washington that the foregoing declaration is true and correct.

4 Dated this 12th day of February, 2004 at Seattle, Washington.

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8 Joan C. Foley

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DECLARATION OF JOAN C. FOLEY - 5 of 5
(C-01-0467C)
[108010 v12]

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1

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BEHR PROCESS CORPORATION,

Plaintiff,

vs.

BULLIVANT HOUSER BAILEY, P.C.;
JOHNSON CHRISTIE ANDREWS &
SKINNER, P.S.; RICHARD L. MARTENS and
JANE DOE MARTENS and the marital
community thereof; and E. PENNOCK GHEEN
and JANE DOE GHEEN and the marital
community thereof,

Defendants.

NO. C01-467R

PLAINTIFF'S FIRST REQUESTS FOR
PRODUCTION OF DOCUMENTS TO
DEFENDANTS AND RESPONSES
THERE TO

To: Defendant Bullivant Houser Bailey, P.C. (hereinafter, "Bullivant Houser") and
Defendant E. Pennock Gheen, and their counsel, Mark Honeywell of GORDON
THOMAS HONEYWELL MALANCA PETERSON & DAHEIM, LLP

To: Defendant Richard L. Martens, and his counsel, David Martin of LEE SMART
COOK MARTIN & PATTERSON

To: Defendant Johnson Christie Andrews & Skinner, P.S. (hereinafter, "Johnson
Christie") and its counsel, Kelly Corr & Joshua Preece of CORR CRONIN, LLP

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
DEFENDANTS - 1 of 19

(C01-467R)
[97652 v24.doc]

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Pursuant to Fed. R. Civ. P. 34, Plaintiff Behr Process Corp. (hereinafter, "Behr") propounds the following requests for production to Defendants. The responsive documents should be produced for inspection and copying within thirty (30) days from the date of service of these requests at the offices of the undersigned counsel for Behr. Under Fed. R. Civ. P. 26(e), these discovery requests are continuing in nature.

If you object to a request for production and withhold information, please specifically identify the information being withheld and the basis for the objection. If any information, document or thing falling within the scope of any of these discovery requests is withheld on the basis of a claim of privilege or attorney work product, please state: the nature of the document or thing; subject matter; date; identity of author, originator, sender and each person who is known to have received the document or thing whether or not named as an addressee; and the basis for its withholding.

DEFINITIONS

"Document" or "documents" means all written, printed, typed, punched, taped, electronically stored, filmed or graphic matter, however produced or reproduced, of every kind and description, in the actual or constructive possession, custody, trust, care, or control of Defendants Bullivant Houser Bailey, P.C., E. Pennock Gheen, Richard L. Martens, Johnson Christie Andrews & Skinner, P.S., including, but not limited to, any correspondence, diary or journal entries, memoranda, notes, internet website content, or any other materials which contain any verbal, graphic, or pictorial information.

"Person" includes both natural persons and legal entities, e.g., associations, partnerships, corporations and law firms.

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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(C01-467R)
[97652 v24.doc]

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1 "You" or "yours" refers to Bullivant Houser Bailey, P.C., E. Pennock Gheen, Richard
 2 L. Martens, Johnson Christie Andrews & Skinner, P.S., and any of their former or present
 3 employees, attorneys, representatives or agents.

4 "Insurers" refers to American International Specialty Lines Insurance Company, f/k/a
 5 American International Surplus Lines Insurance Company ("AISLIC") and Zurich Insurance
 6 Company ("Zurich").
 7

8 "Smith" refers to *Smith v. Behr Process Corp.*, Grays Harbor Cause No. 98-2-00635-4,
 9 during its pendency in the trial court and on appeal.

10 "Relating to" shall mean any document which is relevant in any way to the subject
 11 matter, including without limitation, all documents which contain, record, reflect, summarize,
 12 evaluate, comment upon, transmit or discuss the subject matter of any request, as well as the
 13 text or notes of any oral or written presentation or conversation.
 14

15 As used in these discovery requests, singular designations include the plural and the
 16 plural the singular; masculine, feminine, and neuter gender include each other; and past tense
 17 include the present and present the past.

18 **DEFENDANTS BULLIVANT HOUSER BAILEY, P.C.'S, AND**
 19 **E. PENNOCK GHEEN'S**
 20 **PRELIMINARY STATEMENT**

21 These responses and objections are based on facts and information presently known and
 22 available to responding Defendants. Responding Defendants have not yet received document
 23 production from Plaintiff, nor have responding Defendants taken depositions in this action.
 24 Therefore, responding Defendants reserve the right, without obligation, to amend these
 25 responses and objections to provide additional or different information based on the results of
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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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1 subsequent investigation, discovery and preparation. Moreover, these responses are given
2 without prejudice to using, or relying on at trial, subsequently developed documents, or
3 documents now known, whose relevance, significance or applicability has not yet been fully
4 ascertained, or documents omitted from these responses as a result of potential error or
5 oversight. Responding Defendants incorporate this initial Preliminary Statement and all of the
6 following General Objections into each and every response as though fully stated therein.
7

8 GENERAL OBJECTIONS

9 1. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to each
10 request to the extent that it seeks documents that are equally accessible and available to
11 Plaintiff. The vast majority of requested documents are already in the possession of Plaintiff
12 and/or Plaintiff's counsel. Furthermore, Defendants Bullivant Houser Bailey, P.C., and E.
13 Pennock Gheen have already produced/made available for inspection to Plaintiff the vast
14 majority of requested documents on multiple occasions. Defendants Bullivant Houser Bailey,
15 P.C., and E. Pennock Gheen therefore respond to each such request by stating that they will
16 make such documents available for inspection if they are not already in Plaintiff's possession or
17 cannot be readily obtained by Plaintiff.
18

19 2. The sheer size and volume of these requests for production, and many of the
20 specific requests, manifest a clear intent by Plaintiff to intimidate, harass, embarrass and place
21 undue and unjustifiable burdens on Defendants in violation of the Federal Rules of Civil
22 Procedure. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to those
23 requests that are designed to harass, intimidate, embarrass and place undue and unjustifiable
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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
DEFENDANTS - 4 of 19
(C01-467R)
[97652 v24.doc]

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1 burdens on Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen and that are not
2 instead reasonably calculated to lead to the discovery of admissible evidence.

3 3. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to these
4 discovery requests to the extent that they are overly broad, vague, ambiguous, and not
5 reasonably calculated to lead to the discovery of admissible evidence.

6 4. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to the
7 definitions and procedures to the extent they seek information which Plaintiffs are not required
8 to provide under the Federal Rules of Civil Procedure. Defendants Bullivant Houser Bailey,
9 P.C., and E. Pennock Gheen decline to comply with such instructions, except to the extent to
10 which those instructions are consistent with those Rules.

11 5. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to and
12 do not accept any duty to supplement their responses to these Discovery Requests except to the
13 extent required by the Federal Rules of Civil Procedure.

14 6. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to the
15 discovery requests to the extent that they seek information, documents or things protected by
16 the attorney-client privilege, the work product doctrine, or any other applicable privilege or
17 doctrine. No privileged or protected information or documents will be provided, and
18 inadvertent disclosure shall not be deemed a waiver of any such privilege.

19 7. The parties to this action currently are negotiating on an appropriate protective
20 order. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen will not produce any
21 documents until such a protective order is entered by the Court pursuant to Federal Rule of
22 Civil Procedure 26(c).

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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
DEFENDANTS - 5 of 19
(C01-467R)
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1 8. Defendants Bullivant Houser Bailey, P.C.'s, and E. Pennock Gheen's responses
2 to these discovery requests represent their reasonable efforts to provide information within their
3 possession, custody or control, obtained after a reasonable, diligent and good faith search in
4 accordance with the Federal Rules of Civil Procedure.. Responding Defendants reserve the
5 right to amend or alter their responses, and to produce additional documents subsequently
6 discovered.

7
8 9. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to each
9 request for production to the extent it seeks documents not within Defendants Bullivant Houser
10 Bailey, P.C.'s, and E. Pennock Gheen's possession, custody, or control. Defendants Bullivant
11 Houser Bailey, P.C., and E. Pennock Gheen will produce only responsive non-privileged
12 documents that are within their possession, custody, or control.

13
14 10. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to each
15 document request to the extent that it calls for the documents "pertaining to," "referring to" or
16 "relating to," with respect to "any" or "each" particular entity, or subject, on the basis that such
17 request is vague, overly broad, and seeks the production of documents that are not reasonably
18 calculated to lead to the discovery of admissible evidence.

19 11. To the extent these requests for production seek electronic mail prior to May
20 1998 in the possession of responding Defendants, such electronic mail, if any, is contained in
21 back-up tapes from a system no longer in use by responding Defendants. Responding
22 Defendants will not produce such electronic mail until parties' counsel reach final agreement,
23 and/or an order is entered by the Court concerning costs of production of such electronic mail.
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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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RESPONSES TO DOCUMENT REQUESTS

Incorporating by reference the Preliminary Statement and General Objections set forth above, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond to the individual requests as follows:

DISCOVERY REQUESTS

Request for Production No. 1: Please produce all documents in any way relating to your representation of Behr Process Corp. in *Truax et al. v. Behr Process Corp.*, Grays Harbor Cause No. 96-2-00737 (the "*Truax* case").

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the ground stated in General Objection No. 11, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Documents responsive to this request will be made available for inspection at a mutually convenient date and location.

Request for Production No. 2: Please produce all your marketing and promotional materials including, but not limited to, advertisements, websites, any printed or electronic materials provided by you to prospective clients, and presentations or seminars for existing or prospective clients from 1996 to present.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 2 and 3, above. The scope of the request is

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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unduly burdensome, overbroad, and seeks the production of documents that are not reasonably calculated to lead to the discovery of admissible evidence. There is no discoverable basis for obtaining the requested materials, if in existence, from each of the 180 attorneys in Defendant Bullivant Houser Bailey, P.C.'s seven offices, because of the overbreadth and undue burdensomeness of this request, and, Defendant Bullivant Houser Bailey, P.C. has not undertaken to locate such documents from each of those lawyers. Defendant E. Pennock Gheen does not maintain, and has not during the relevant period maintained, a marketing file. Without waiving said objections and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Subject to the above limitation, documents responsive to this request will be available for inspection at a mutually convenient date and location.

Request for Production No. 3: Please produce all Washington State Bar Association disciplinary records relating to any of the attorneys in your firm who were involved in the defense of Behr in the *Smith* case, from 1996 to present.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2, and 3, above. Without waiving these objections and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Pursuant to a September 11, 2003 telephone conference with Plaintiff's counsel, Plaintiff and responding Defendants agreed to limit RFP

No. 3 from 1997 to the present. To the best of responding Defendants' knowledge, there are no such documents.

Request for Production No. 4: Please produce all documents relating to any claims, complaints or client letters from 1996 to present, containing, without limitation, allegations of conflict of interest, improper business, billing or staffing practices, or breaches of legal ethics by your law firm.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 2, 3, and 6, above. Among other things, the breadth of this request would require these Defendants to search every single past and present client file for the past seven (7) years. Without waiving these objections and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Excerpts of annual E&O insurance applications; "claims, complaints, or client letters" concerning the attorneys at Bullivant Houser Bailey, P.C. who represented Behr in *Smith* and *Truax*, apart from those that may be contained in individual client files; and audit letters from or on behalf of the Insurers in *Smith* and *Truax*, will be made available for inspection at a mutually convenient date and location.

Request for Production No. 5: Please produce all documents in any way relating to your business relationship with the insurers, including, but not limited to, any agreements, billing and other guidelines, and any practices or procedures relating to the opening or maintaining of client files or matters that involve insurers.

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
DEFENDANTS - 9 of 19
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RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2 and 3, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Documents responsive to this request will be made available for inspection at a mutually convenient date and location.

Request for Production No. 6: Please produce all documents indicating what part of your annual revenues are attributable to cases where any of the insurers was either your client or paid your bill on behalf of your client, from 1996 to present.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 2 and 3, above. This request seeks information that is beyond the scope of discovery, proprietary in nature, overbroad in terms of time, and specifically designed to harass this defendant. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen have previously produced the billings in this matter. Furthermore, this type of information is not contained in any documents the responding Defendants keep in the ordinary course of business. Without waiving these objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: *See Exhibit A*, which was prepared to respond to this request.

Request for Production No. 7: Please produce all documents in any way relating to the claims or defenses in this action that you did not identify or produce as part of your initial disclosure under Fed. R. Civ. P. 26(a).

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2, 3, and 11, above. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this on the ground that discovery is in its early stages and continuing in this matter and accordingly all documents and facts supporting responding Defendants' "claims or defenses in this action" have not yet been produced to or ascertained by, responding Defendants.

Request for Production No. 8: Please produce all documents, including, but not limited to, correspondence, e-mails and internal memoranda in any way relating to your defense of Behr in the *Smith* case.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2, 3, and 11, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Documents responsive to this request will be made available for inspection at a mutually convenient date and location.

Request for Production No. 9: *(To Johnson Christie and Richard L. Martens)* Please produce all documents in any way relating to Richard L. Martens' departure from Johnson

Christie, including, but not limited to, personnel files, internal evaluations, and management committee documents.

RESPONSE:

Request for Production No. 10: *(To Johnson Christie and Richard L. Martens)*

Please produce all documents in any way relating to the sanctions in *Eagle Hardware & Garden, Inc. et al. v. Valiant Ins. Co.*, U.S. Dist. Ct. No. C98-0916Z (the "Eagle case"), including, but not limited to, any efforts to settle the Eagle case or vacate the sanctions subsequent to March 2000, and any documents relating to the payment of the sanctions.

RESPONSE:

Request for Production No. 11: Please produce all documents in any way relating to your fee arrangements with the insurers, including, but not limited to, documents showing your regular rates and/or discounted rates, if any, in cases involving insurers from 1996 to present.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2, and 3, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Documents responsive to this request will be made available for inspection at a mutually convenient date and location.

Request for Production No. 12: Please produce all documents in any way relating to the performance evaluations of any attorneys in your firm who were involved in the defense of

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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[97652 v24.doc]

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PETERSON & DAHEIM LLP
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SEATTLE, WASHINGTON 98101-4185
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1 Behr in the *Smith* case; as to Messrs. Martens and Gheen, please also produce documents
2 showing their experience in the ten (10) years preceding the *Smith* case, including the number
3 and types of cases they tried, and records of any CLEs attended by Messrs. Martens and Gheen
4 pertaining to discovery obligations under Washington law.

5 **RESPONSE:**

6 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
7 on the grounds stated in General Objection Nos. 2, 3, and 6, above. The scope of this request is
8 unduly burdensome, overbroad, and seeks the production of documents that are not reasonably
9 calculated to lead to the discovery of admissible evidence. As to requested performance
10 evaluations, Defendants Bullivant Houser Bailey, P.C.'s, past and current personnel files are
11 confidential and not subject to release to anyone other than the Bullivant Houser Bailey, P.C.
12 management without the express written and signed authorization of the individuals involved.
13 As to documents "showing their experience in the ten (10) years preceding the *Smith* case,
14 including the number and types of cases they tried," such are contained in exceedingly large
15 numbers of individual client files, and Bullivant Houser Bailey P.C. has not undertaken this
16 overbroad and unduly burdensome level of review. Without waiving said objections, and
17 subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock
18 Gheen respond as follows: Performance evaluations from 1996 to the present of attorneys at
19 Bullivant Houser Bailey, P.C. whose work on the *Smith* and *Truax* cases exceeded ten hours
20 and for whom express written and signed authorizations of release of document have been
21 obtained, will be made available for inspection at a mutually convenient date and location.
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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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Responsive CLE records to this request for defendant E. Pennock Gheen will be available for inspection at a mutually convenient date and location.

Request for Production No. 13: Please produce all documents in any way relating to Messrs. Martens and Gheen's compensation during the pendency of the *Smith* case.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2 and 3, above. Furthermore, this type of information is not contained in any documents the responding Defendants keep in the ordinary course of business. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Pursuant to a September 11, 2003 telephone conference with Plaintiff's counsel, Plaintiff and responding Defendants agreed to limit RFP 13 to provision of information reflecting Mr. Gheen's compensation during the pendency of the *Smith* case relative to a year prior to the *Smith* case. See Exhibit B, which was prepared to respond to this request.

Request for Production No. 14: (To defendant Bullivant Houser) Please produce all documents, including, but not limited to, internal memoranda and e-mails, in any way relating to the discharge of Mr. Gheen and Bullivant Houser from the *Smith* case.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2 and 3, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,

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[97652 v24.doc]

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1 and E. Pennock Gheen respond as follows: Documents responsive to this request will be made
2 available for inspection at a mutually convenient date and location.

3
4 **Request for Production No. 15:** Please produce all documents in any way relating to
5 your document retention policy and all documents showing what materials related to *Smith*, if
6 any, have been destroyed pursuant to such policy.

7 **RESPONSE:**

8 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
9 on the grounds stated in General Objection Nos. 2 and 3, above. Without waiving said
10 objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,
11 and E. Pennock Gheen respond as follows: To the best of responding Defendant's knowledge
12 no documents in *Smith* were destroyed pursuant to Bullivant Houser Bailey, P.C.'s document
13 retention policy. Defendant Bullivant Houser Bailey, P.C., has a document retention policy,
14 which will be provided.

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17 **Request for Production No. 16:** Please produce all documents in any way relating to
18 your reports to, or communications with, the insurers in any way relating to the *Truax* case, the
19 *Smith* case, or this action.

20 **RESPONSE:**

21 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
22 on the grounds stated in General Objection Nos. 1, 2 and 3, above. Without waiving said
23 objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,
24 and E. Pennock Gheen respond as follows: Documents relating to reports or communications
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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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[97652 v24.doc]

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1 with Insurers relating to the *Truax* and/or *Smith* cases will be produced at a mutually
2 convenient date and location. With regard to "this action," as that term is used in this request,
3 responding Defendants object to this request as it is invasive of the attorney-client and work
4 product privileges to the extent it requests communications responding Defendants and/or its
5 counsel may have had with any person, entity, or insurer.

7 **Request for Production No. 17:** Please produce all of your training materials in any
8 way relating to compliance with an attorney's discovery obligations under *Washington State*
9 *Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wn.2d 299 (1993), including but not
10 limited to, any client questionnaires and interview outlines.

11
12 **RESPONSE:**

13 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
14 on the grounds stated in General Objection Nos. 2 and 3, above. Without waiving said
15 objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,
16 and E. Pennock Gheen respond as follows: In a September 11, 2003 telephone conference with
17 Plaintiffs' counsel, Plaintiff has told Defendants Bullivant Houser Bailey, P.C., and E. Pennock
18 Gheen that "client questionnaires and interview outlines" refer to attorney training materials.
19 Responding Defendants are in the process of searching for any such training materials, and
20 such training materials, if they still exist, will be made available for inspection at a mutually
21 convenient date and location.
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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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1 DATED this 26th day of August, 2003.

2 DORSEY & WHITNEY LLP

3 _____ /s/
4 EVAN L. SCHWAB WSBA #2174
5 RITA V. LATSINOVA WSBA #24447

6 AND:

7 PAUL SUGARMAN, *PRO HAC VICE*
8 TIMOTHY BUTLER, WSBA #19841
9 HELLER EHRMAN WHITE & MCAULIFFE
10 701 FIFTH AVE., SUITE 6100
11 SEATTLE, WA 98104
12 (206) 447-0900

13 Attorneys for Plaintiff
14 BEHR PROCESS CORPORATION
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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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ANSWERS DATED: September 30, 2003

STATE OF WASHINGTON)

COUNTY OF King) ss

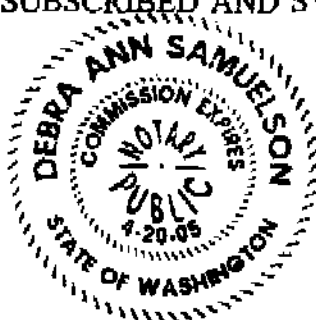
THOMAS D. ADAMS, being first duly sworn on oath, deposes and says:
I have authority to sign on behalf of the defendant(s) above-named, I have read the foregoing Responses to Plaintiff's First Request for Production to Defendants, know the contents thereof, and believe the same to be true and correct to the best of my knowledge.

John D. Adams

By: THOMAS D. ADAMS, S.F.L. - Seattle Office
BULLHART-HANSEN SANCY, P.C.

SUBSCRIBED AND SWORN to before me this 30th day of September

2003.



Debra Ann Samuelson
Print/Type Name: Debra Ann Samuelson
Notary Public in and for the State of Washington
residing at Edmonds
My Commission Expires: 4-20-05

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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[97652 v24]

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ATTORNEY CERTIFICATION

The undersigned attorney for defendant(s) Bullivant Houser Bailey, P.C., E. Pennock Gheen, Richard L. Martens, and Johnson Christie Andrews & Skinner, P.S. has reviewed the foregoing responses to Plaintiff's First Requests for Production to Defendants, and certifies that they are in compliance with Federal Rule of Civil Procedure 26(g).

DATED this 30th day of September, 2003.

GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM LLP

By:


Mark G. Honeywell, WSBA #1567
Joan C. Foley, WSBA No. 25861
600 University Street, Suite 2100
Seattle, WA 98101

Telephone: (206) 676-7500

Facsimile: (206) 676-7575

Counsel for Defendants Bullivant Houser
Bailey, P.C., E. Pennock Gheen and Jane Doe Gheen

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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2

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BEHR PROCESS CORPORATION,

Plaintiff,

vs.

BULLIVANT HOUSER BAILEY, P.C.;
JOHNSON CHRISTIE ANDREWS &
SKINNER, P.S.; RICHARD L. MARTENS and
JANE DOE MARTENS and the marital
community thereof; and E. PENNOCK GHEEN
and JANE DOE GHEEN and the marital
community thereof,

Defendants.

NO. C01-467R

PLAINTIFF'S FIRST REQUESTS FOR
PRODUCTION OF DOCUMENTS TO
DEFENDANTS AND RESPONSES
THERE TO

To: Defendant Bullivant Houser Bailey, P.C. (hereinafter, "Bullivant Houser") and
Defendant E. Pennock Gheen, and their counsel, Mark Honeywell of GORDON
THOMAS HONEYWELL MALANCA PETERSON & DAHEIM, LLP

To: Defendant Richard L. Martens, and his counsel, David Martin of LEE SMART
COOK MARTIN & PATTERSON

To: Defendant Johnson Christie Andrews & Skinner, P.S. (hereinafter, "Johnson
Christie") and its counsel, Kelly Corr & Joshua Preece of CORR CRONIN, LLP

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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[97652 v25.doc]

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Pursuant to Fed. R. Civ. P. 34, Plaintiff Behr Process Corp. (hereinafter, "Behr") propounds the following requests for production to Defendants. The responsive documents should be produced for inspection and copying within thirty (30) days from the date of service of these requests at the offices of the undersigned counsel for Behr. Under Fed. R. Civ. P. 26(e), these discovery requests are continuing in nature.

If you object to a request for production and withhold information, please specifically identify the information being withheld and the basis for the objection. If any information, document or thing falling within the scope of any of these discovery requests is withheld on the basis of a claim of privilege or attorney work product, please state: the nature of the document or thing; subject matter; date; identity of author, originator, sender and each person who is known to have received the document or thing whether or not named as an addressee; and the basis for its withholding.

DEFINITIONS

"Document" or "documents" means all written, printed, typed, punched, taped, electronically stored, filmed or graphic matter, however produced or reproduced, of every kind and description, in the actual or constructive possession, custody, trust, care, or control of Defendants Bullivant Houser Bailey, P.C., E. Pennock Gheen, Richard L. Martens, Johnson Christie Andrews & Skinner, P.S., including, but not limited to, any correspondence, diary or journal entries, memoranda, notes, internet website content, or any other materials which contain any verbal, graphic, or pictorial information.

"Person" includes both natural persons and legal entities, e.g., associations, partnerships, corporations and law firms.

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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(C01-467R)
[97652 v25.doc]

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ONE LINCOLN SQUARE
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1 "You" or "yours" refers to Bullivant Houser Bailey, P.C., E. Pennock Gheen, Richard
 2 L. Martens, Johnson Christie Andrews & Skinner, P.S., and any of their former or present
 3 employees, attorneys, representatives or agents.

4 "Insurers" refers to American International Specialty Lines Insurance Company, f/k/a
 5 American International Surplus Lines Insurance Company ("AISLIC") and Zurich Insurance
 6 Company ("Zurich").
 7

8 "Smith" refers to *Smith v. Behr Process Corp.*, Grays Harbor Cause No. 98-2-00635-4,
 9 during its pendency in the trial court and on appeal.

10 "Relating to" shall mean any document which is relevant in any way to the subject
 11 matter, including without limitation, all documents which contain, record, reflect, summarize,
 12 evaluate, comment upon, transmit or discuss the subject matter of any request, as well as the
 13 text or notes of any oral or written presentation or conversation.
 14

15 As used in these discovery requests, singular designations include the plural and the
 16 plural the singular; masculine, feminine, and neuter gender include each other; and past tense
 17 include the present and present the past.

18 **DEFENDANTS BULLIVANT HOUSER BAILEY, P.C.'S, AND**
 19 **E. PENNOCK GHEEN'S**
 20 **PRELIMINARY STATEMENT**

21 These responses and objections are based on facts and information presently known and
 22 available to responding Defendants. Responding Defendants have not yet received document
 23 production from Plaintiff, nor have responding Defendants taken depositions in this action.
 24 Therefore, responding Defendants reserve the right, without obligation, to amend these
 25 responses and objections to provide additional or different information based on the results of
 26

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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subsequent investigation, discovery and preparation. Moreover, these responses are given without prejudice to using, or relying on at trial, subsequently developed documents, or documents now known, whose relevance, significance or applicability has not yet been fully ascertained, or documents omitted from these responses as a result of potential error or oversight. Responding Defendants incorporate this initial Preliminary Statement and all of the following General Objections into each and every response as though fully stated therein.

GENERAL OBJECTIONS

1. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to each request to the extent that it seeks documents that are equally accessible and available to Plaintiff. The vast majority of requested documents are already in the possession of Plaintiff and/or Plaintiff's counsel. Furthermore, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen have already produced/made available for inspection to Plaintiff the vast majority of requested documents on multiple occasions. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen therefore respond to each such request by stating that they will make such documents available for inspection if they are not already in Plaintiff's possession or cannot be readily obtained by Plaintiff.

2. The sheer size and volume of these requests for production, and many of the specific requests, manifest a clear intent by Plaintiff to intimidate, harass, embarrass and place undue and unjustifiable burdens on Defendants in violation of the Federal Rules of Civil Procedure. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to those requests that are designed to harass, intimidate, embarrass and place undue and unjustifiable

1 burdens on Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen and that are not
2 instead reasonably calculated to lead to the discovery of admissible evidence.

3 3. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to these
4 discovery requests to the extent that they are overly broad, vague, ambiguous, and not
5 reasonably calculated to lead to the discovery of admissible evidence.
6

7 4. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to the
8 definitions and procedures to the extent they seek information which Plaintiffs are not required
9 to provide under the Federal Rules of Civil Procedure. Defendants Bullivant Houser Bailey,
10 P.C., and E. Pennock Gheen decline to comply with such instructions, except to the extent to
11 which those instructions are consistent with those Rules.

12 5. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to and
13 do not accept any duty to supplement their responses to these Discovery Requests except to the
14 extent required by the Federal Rules of Civil Procedure.
15

16 6. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to the
17 discovery requests to the extent that they seek information, documents or things protected by
18 the attorney-client privilege, the work product doctrine, or any other applicable privilege or
19 doctrine. No privileged or protected information or documents will be provided, and
20 inadvertent disclosure shall not be deemed a waiver of any such privilege.
21

22 7. The parties to this action currently are negotiating on an appropriate protective
23 order. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen will not produce any
24 documents until such a protective order is entered by the Court pursuant to Federal Rule of
25 Civil Procedure 26(c).
26

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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1 8. Defendants Bullivant Houser Bailey, P.C.'s, and E. Pennock Gheen's responses
2 to these discovery requests represent their reasonable efforts to provide information within their
3 possession, custody or control, obtained after a reasonable, diligent and good faith search in
4 accordance with the Federal Rules of Civil Procedure.. Responding Defendants reserve the
5 right to amend or alter their responses, and to produce additional documents subsequently
6 discovered.
7

8 9. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to each
9 request for production to the extent it seeks documents not within Defendants Bullivant Houser
10 Bailey, P.C.'s, and E. Pennock Gheen's possession, custody, or control. Defendants Bullivant
11 Houser Bailey, P.C., and E. Pennock Gheen will produce only responsive non-privileged
12 documents that are within their possession, custody, or control.
13

14 10. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to each
15 document request to the extent that it calls for the documents "pertaining to," "referring to" or
16 "relating to," with respect to "any" or "each" particular entity, or subject, on the basis that such
17 request is vague, overly broad, and seeks the production of documents that are not reasonably
18 calculated to lead to the discovery of admissible evidence.
19

20 11. To the extent these requests for production seek electronic mail prior to May
21 1998 in the possession of responding Defendants, such electronic mail, if any, is contained in
22 back-up tapes from a system no longer in use by responding Defendants. Responding
23 Defendants will not produce such electronic mail until parties' counsel reach final agreement,
24 and/or an order is entered by the Court concerning costs of production of such electronic mail.
25
26

RESPONSES TO DOCUMENT REQUESTS

Incorporating by reference the Preliminary Statement and General Objections set forth above, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond to the individual requests as follows:

DISCOVERY REQUESTS

Request for Production No. 1: Please produce all documents in any way relating to your representation of Behr Process Corp. in *Truax et al. v. Behr Process Corp.*, Grays Harbor Cause No. 96-2-00737 (the "*Truax* case").

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the ground stated in General Objection No. 11, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Documents responsive to this request will be made available for inspection at a mutually convenient date and location.

Request for Production No. 2: Please produce all your marketing and promotional materials including, but not limited to, advertisements, websites, any printed or electronic materials provided by you to prospective clients, and presentations or seminars for existing or prospective clients from 1996 to present.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 2 and 3, above. The scope of the request is

unduly burdensome, overbroad, and seeks the production of documents that are not reasonably calculated to lead to the discovery of admissible evidence. There is no discoverable basis for obtaining the requested materials, if in existence, from each of the 180 attorneys in Defendant Bullivant Houser Bailey, P.C.'s seven offices, because of the overbreadth and undue burdensomeness of this request, and, Defendant Bullivant Houser Bailey, P.C. has not undertaken to locate such documents from each of those lawyers. Defendant E. Pennock Gheen does not maintain, and has not during the relevant period maintained, a marketing file. Without waiving said objections and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Subject to the above limitation, documents responsive to this request will be available for inspection at a mutually convenient date and location.

Request for Production No. 3: Please produce all Washington State Bar Association disciplinary records relating to any of the attorneys in your firm who were involved in the defense of Behr in the *Smith* case, from 1996 to present.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2, and 3, above. Without waiving these objections and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Pursuant to a September 11, 2003 telephone conference with Plaintiff's counsel, Plaintiff and responding Defendants agreed to limit RFP

No. 3 from 1997 to the present. To the best of responding Defendants' knowledge, there are no such documents.

Request for Production No. 4: Please produce all documents relating to any claims, complaints or client letters from 1996 to present, containing, without limitation, allegations of conflict of interest, improper business, billing or staffing practices, or breaches of legal ethics by your law firm.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 2, 3, and 6, above. Among other things, the breadth of this request would require these Defendants to search every single past and present client file for the past seven (7) years. Without waiving these objections and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Excerpts of annual E&O insurance applications; "claims, complaints, or client letters" concerning the attorneys at Bullivant Houser Bailey, P.C. who represented Behr in *Smith* and *Truax*, apart from those that may be contained in individual client files; and audit letters from or on behalf of the Insurers in *Smith* and *Truax*, will be made available for inspection at a mutually convenient date and location.

Request for Production No. 5: Please produce all documents in any way relating to your business relationship with the insurers, including, but not limited to, any agreements, billing and other guidelines, and any practices or procedures relating to the opening or maintaining of client files or matters that involve insurers.

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2 and 3, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Documents responsive to this request will be made available for inspection at a mutually convenient date and location.

Request for Production No. 6: Please produce all documents indicating what part of your annual revenues are attributable to cases where any of the insurers was either your client or paid your bill on behalf of your client, from 1996 to present.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 2 and 3, above. This request seeks information that is beyond the scope of discovery, proprietary in nature, overbroad in terms of time, and specifically designed to harass this defendant. Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen have previously produced the billings in this matter. Furthermore, this type of information is not contained in any documents the responding Defendants keep in the ordinary course of business. Without waiving these objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: See Exhibit A, which was prepared to respond to this request.

1 **Request for Production No. 7:** Please produce all documents in any way relating to
 2 the claims or defenses in this action that you did not identify or produce as part of your initial
 3 disclosure under Fed. R. Civ. P. 26(a).

4 **RESPONSE:**

5 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
 6 on the grounds stated in General Objection Nos. 1, 2, 3, and 11, above. Defendants Bullivant
 7 Houser Bailey, P.C., and E. Pennock Gheen object to this on the ground that discovery is in its
 8 early stages and continuing in this matter and accordingly all documents and facts supporting
 9 responding Defendants' "claims or defenses in this action" have not yet been produced to or
 10 ascertained by, responding Defendants.
 11

12 **Request for Production No. 8:** Please produce all documents, including, but not
 13 limited to, correspondence, e-mails and internal memoranda in any way relating to your
 14 defense of Behr in the *Smith* case.
 15

16 **RESPONSE:**

17 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
 18 on the grounds stated in General Objection Nos. 1, 2, 3, and 11, above. Without waiving said
 19 objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,
 20 and E. Pennock Gheen respond as follows: Documents responsive to this request will be made
 21 available for inspection at a mutually convenient date and location.
 22

23 **Request for Production No. 9: (To Johnson Christie and Richard L. Martens)** Please
 24 produce all documents in any way relating to Richard L. Martens' departure from Johnson
 25
 26

Christie, including, but not limited to, personnel files, internal evaluations, and management committee documents.

RESPONSE:

Request for Production No. 10: *(To Johnson Christie and Richard L. Martens)*

Please produce all documents in any way relating to the sanctions in *Eagle Hardware & Garden, Inc. et al. v. Valiant Ins. Co.*, U.S. Dist. Ct. No. C98-0916Z (the "Eagle case"), including, but not limited to, any efforts to settle the Eagle case or vacate the sanctions subsequent to March 2000, and any documents relating to the payment of the sanctions.

RESPONSE:

Request for Production No. 11: Please produce all documents in any way relating to your fee arrangements with the insurers, including, but not limited to, documents showing your regular rates and/or discounted rates, if any, in cases involving insurers from 1996 to present.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2, and 3, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Documents responsive to this request will be made available for inspection at a mutually convenient date and location.

Request for Production No. 12: Please produce all documents in any way relating to the performance evaluations of any attorneys in your firm who were involved in the defense of

Behr in the *Smith* case; as to Messrs. Martens and Gheen, please also produce documents showing their experience in the ten (10) years preceding the *Smith* case, including the number and types of cases they tried, and records of any CLEs attended by Messrs. Martens and Gheen pertaining to discovery obligations under Washington law.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 2, 3, and 6, above. The scope of this request is unduly burdensome, overbroad, and seeks the production of documents that are not reasonably calculated to lead to the discovery of admissible evidence. As to requested performance evaluations, Defendants Bullivant Houser Bailey, P.C.'s, past and current personnel files are confidential and not subject to release to anyone other than the Bullivant Houser Bailey, P.C. management without the express written and signed authorization of the individuals involved. As to documents "showing their experience in the ten (10) years preceding the *Smith* case, including the number and types of cases they tried," such are contained in exceedingly large numbers of individual client files, and Bullivant Houser Bailey P.C. has not undertaken this overbroad and unduly burdensome level of review. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Performance evaluations from 1996 to the present of attorneys at Bullivant Houser Bailey, P.C. whose work on the *Smith* and *Truax* cases exceeded ten hours and for whom express written and signed authorizations of release of document have been obtained, will be made available for inspection at a mutually convenient date and location.

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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(C01-467R)
[97652 v25.doc]

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Responsive CLE records to this request for defendant E. Pennock Gheen will be available for inspection at a mutually convenient date and location.

Request for Production No. 13: Please produce all documents in any way relating to Messrs. Martens and Gheen's compensation during the pendency of the *Smith* case.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2 and 3, above. Furthermore, this type of information is not contained in any documents the responding Defendants keep in the ordinary course of business. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen respond as follows: Pursuant to a September 11, 2003 telephone conference with Plaintiff's counsel, Plaintiff and responding Defendants agreed to limit RFP 13 to provision of information reflecting Mr. Gheen's compensation during the pendency of the *Smith* case relative to a year prior to the *Smith* case. See Exhibit B, which was prepared to respond to this request.

Request for Production No. 14: (*To defendant Bullivant Houser*) Please produce all documents, including, but not limited to, internal memoranda and e-mails, in any way relating to the discharge of Mr. Gheen and Bullivant Houser from the *Smith* case.

RESPONSE:

Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request on the grounds stated in General Objection Nos. 1, 2 and 3, above. Without waiving said objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,

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(C01-467R)
[97652 v25.doc]

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1 and E. Pennock Gheen respond as follows: Documents responsive to this request will be made
2 available for inspection at a mutually convenient date and location.

3
4 **Request for Production No. 15:** Please produce all documents in any way relating to
5 your document retention policy and all documents showing what materials related to *Smith*, if
6 any, have been destroyed pursuant to such policy.

7 **RESPONSE:**

8 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
9 on the grounds stated in General Objection Nos. 2 and 3, above. Without waiving said
10 objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,
11 and E. Pennock Gheen respond as follows: To the best of responding Defendant's knowledge
12 no documents in *Smith* were destroyed pursuant to Bullivant Houser Bailey, P.C.'s document
13 retention policy. Defendant Bullivant Houser Bailey, P.C., has a document retention policy,
14 which will be provided.
15

16
17 **Request for Production No. 16:** Please produce all documents in any way relating to
18 your reports to, or communications with, the insurers in any way relating to the *Truax* case, the
19 *Smith* case, or this action.

20 **RESPONSE:**

21 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
22 on the grounds stated in General Objection Nos. 1, 2 and 3, above. Without waiving said
23 objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,
24 and E. Pennock Gheen respond as follows: Documents relating to reports or communications
25

26 PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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[97652 v25.doc]

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1 with Insurers relating to the *Truax* and/or *Smith* cases will be produced at a mutually
 2 convenient date and location. With regard to "this action," as that term is used in this request,
 3 responding Defendants object to this request as it is invasive of the attorney-client and work
 4 product privileges to the extent it requests communications responding Defendants and/or its
 5 counsel may have had with any person, entity, or insurer.

7 **Request for Production No. 17:** Please produce all of your training materials in any
 8 way relating to compliance with an attorney's discovery obligations under *Washington State*
 9 *Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wn.2d 299 (1993), including but not
 10 limited to, any client questionnaires and interview outlines.

12 **RESPONSE:**

13 Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen object to this request
 14 on the grounds stated in General Objection Nos. 2 and 3, above. Without waiving said
 15 objections, and subject to General Objection No. 7, Defendants Bullivant Houser Bailey, P.C.,
 16 and E. Pennock Gheen respond as follows: In a September 11, 2003 telephone conference with
 17 Plaintiffs' counsel, Plaintiff has told Defendants Bullivant Houser Bailey, P.C., and E. Pennock
 18 Gheen that "client questionnaires and interview outlines" refer to attorney training materials.
 19 Responding Defendants are in the process of searching for any such training materials, and
 20 such training materials, if they still exist, will be made available for inspection at a mutually
 21 convenient date and location.
 22

1 DATED this 26th day of August, 2003.

2 DORSEY & WHITNEY LLP

3 /s/
4 EVAN L. SCHWAB WSBA #2174
5 RITA V. LATSINOVA WSBA #24447

6 AND:

7 PAUL SUGARMAN, *PRO HAC VICE*
8 TIMOTHY BUTLER, WSBA #19841
9 HELLER EHRMAN WHITE & MCAULIFFE
10 701 FIFTH AVE., SUITE 6100
11 SEATTLE, WA 98104
12 (206) 447-0900

13 Attorneys for Plaintiff
14 BEHR PROCESS CORPORATION
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PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
DEFENDANTS - 17 of 19
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[97652 v25.doc]

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ANSWERS DATED: Sept 30, 2003

STATE OF WASHINGTON)

COUNTY OF Washington) ss

E. Penrock Gheen, being first duly sworn on oath, deposes and says:
I have authority to sign on behalf of the defendant(s) above-named, I have read the foregoing
Responses to Plaintiff's First Request for Production to Defendants, know the contents thereof,
and believe the same to be true and correct to the best of my knowledge.

By: _____

SUBSCRIBED AND SWORN to before me this 30th day of September
2003.

Deborah L. Messer
Print/Type Name: Deborah L. Messer
Notary Public in and for the State of Washington
residing at Vashon
My Commission Expires: 10/15/04

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
DEFENDANTS - 18 of 19
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[97652 v24.doc]

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ATTORNEY CERTIFICATION

The undersigned attorney for defendant(s) Bullivant Houser Bailey, P.C., E. Pennock Gheen, Richard L. Martens, and Johnson Christie Andrews & Skinner, P.S. has reviewed the foregoing responses to Plaintiff's First Requests for Production to Defendants, and certifies that they are in compliance with Federal Rule of Civil Procedure 26(g).

DATED this 30th day of September, 2003.

GORDON, THOMAS, HONEYWELL, MALANCA,
PETERSON & DAHEIM LLP

By:


Mark G. Honeywell, WSBA #1567
Joan C. Foley, WSBA No. 25861
800 University Street, Suite 2100
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Counsel for Defendants Bullivant Houser

Bailey, P.C., E. Pennock Gheen and Jane Doe Gheen

PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO
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(C01-467R)
[97652 v25.doc]

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October 20, 2003

*TRANSMITTED VIA FAX AND
FIRST CLASS U.S. MAIL*

Evan L. Schwab
Dorsey & Whitney LLP
U.S. Bank Building Center
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101

Timothy Butler
Heller Ehrmann White & McAuliffe, LLP
701 Fifth Ave., Suite 6100
Seattle, WA 98104

RE: *Behr Process Corp. v. Bullivant Houser Bailey, PC, et. al.*

Dear Evan and Tim:

I am writing to memorialize the results of our Rule 37 conference on October 14th concerning Plaintiffs' First Requests for Production of Documents and Responses Thereto by Defendants Bullivant Houser Bailey, P.C., and E. Pennock Gheen.

General Objection No. 11:

Plaintiffs and responding Defendants agreed to pay their own respective costs in retrieving e-mail to outstanding discovery requests.

Responding Defendants will produce responsive e-mail from 2000-2001 in hard copy shortly. Responding Defendants informed Plaintiff that they have preserved 27 back-up tapes that may contain potentially responsive e-mail.

Plaintiff inquired when is the "start" date of e-mails that will be produced. Responding Defendants will respond to this inquiry.

Response to RFP No. 2:

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

October 20, 2003

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Responding Defendants described the volume of documents which will be produced in response to this request. Plaintiff agreed to hold off on addressing any concerns it may have on this Response, until a review of such documents. If Plaintiff perceives the need to do so, it will revisit this Response after that time.

Response to RFP No. 4:

Plaintiff and responding Defendants agreed that responding Defendants do not have to go through individual client files from 1996 on to search for potentially responsive documents, but rather defense counsel will inquire of E. Pennock Gheen if he is aware of complaints or client letters from 1996 to present containing allegations of "conflict of interest, improper business, billing or staffing practices, or breaches of legal ethics" and, if so, produce such documents.

Plaintiff and responding Defendants agreed that responding Defendants will produce correspondence and internal memoranda, if any, to/from managing partners and Insurers concerning handling of defense cases with regard to staffing practices.

Plaintiff and responding Defendants agreed that responding Defendants produce six audit letters for the relevant time period. Plaintiff agreed to hold off on any request for further audit letters until a review of the six audit letters.

Response to RFP No. 6:

Responding Defendants confirmed they will produce the billing records in *Smith* and *Truax*.

Response to RFP No. 12:

Plaintiff stated that it does not believe that authorization by attorneys who were the subject of the requested performance evaluations is required, prior to production of such evaluations. Plaintiff will provide responding Defendants with authority for this position.

Responding Defendants stated that they would determine whether the attorneys who were the subject of the requested performance evaluations have or have not signed written authorizations for the release of the evaluations.

Plaintiff accepted the limitation on this RFP to request only performance evaluations from 1996 to the present of those attorneys at BHB whose work on the *Smith* and *Truax* cases exceeded ten (10) hours. Plaintiff stated that it reserves the right to revisit this limitation, if it perceives the need to do so after a review of the billing records in *Smith* and *Truax*.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

October 20, 2003

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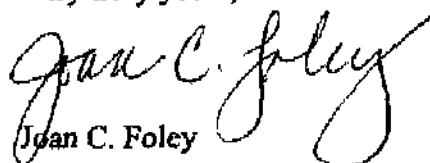
Response to RFP No. 16:

Responding Defendants withdrew the following objection, with the understanding that Insurers does not include Hartford Financial Services:

With regard to "this action," as that term is used in this request, responding Defendants object to this request as it is invasive of the attorney-client and work product privileges to the extent it requests communications responding Defendants and/or its counsel may have had with any person, entity, or insurer.

I trust that this correctly memorializes the results of our Rule 37 conference, unless I hear from you differently.

Very truly yours,


Joan C. Foley

JCF:aeh

cc: Mark G. Honeywell
Donald S. Cohen